

OCT 21 1983

No. 83-507

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Petitioner,
v.
SHELTER FRAMING CORPORATION and
G & R ROOFING COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF AMICUS CURIAE FOR THE PENSION
BENEFIT GUARANTY CORPORATION**

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1. The first Question Presented by the petition for certiorari in this case is identical to the constitutional issue before this Court in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, No. 83-245, and *Oregon-Washington Carpenters-Employers Pension Trust Fund v. R.A. Gray & Co.*, No. 83-291, as to which the Court noted probable jurisdiction on October 17, 1983. Indeed, the petitioner in this case is seeking to review the identical opinion of the Court of Appeals for the Ninth Circuit being reviewed in Nos. 83-245 and 83-291. The court below heard both appeals on the same day and resolved

both with the same written decision.¹ Petitioner in this case sought to defer this Court's consideration of Nos. 83-245 and 83-291 until the present petition was "ripe for consideration," and the Court denied that motion in an order dated October 17, 1983.

In light of the Court's orders of October 17, it appears appropriate that the present petition be held on the Court's docket until the appeals in Nos. 83-245 and 83-291 are decided. For the various reasons enumerated in our previously filed response to petitioner's Motion to Defer, it would be disruptive and dilatory if the present petition were granted just so the Court could consider, in a second case involving only private parties, precisely the same constitutional issue that is presented in Nos. 83-245 and 83-291.

2. The second Question Presented by the petition seeks this Court's review of the constitutionality of the "prospective" application of provisions imposing withdrawal liability on employers withdrawing from multiemployer pension plans. Both courts below explicitly refused to reach that question. See Pet. App. 25a, 70a.² Nor is there

¹ The Pension Benefit Guaranty Corporation (the "PBGC") was a named party only in the *R.A. Gray & Co.* case. Our motion to intervene in the present case was denied by the district court, and the PBGC had only *amicus curiae* status in the court below on the issues presented by the pending petition. Accordingly, we are filing this document in the same *amicus* capacity. Rule 36.4 of the Rules of this Court authorizes such filing, without the consent of the parties, for any "agency of the United States authorized by law to appear in its own behalf." The PBGC has such legal authority pursuant to Section 4002(b)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1302(b)(1).

² The district court stated (emphasis added):

I want to make it very clear that I am expressing no opinion on the statute's validity on either retroactivity or taking grounds as applied to employers who remained in pension plans on or after [the Multiemployer Act's] enactment date. No

any conflict among the circuits on that issue. All courts that have considered the question have ruled in favor of the statute's constitutionality.³ And, contrary to the undocumented suggestion made by petitioner (Pet. 10, n.8), there is no reason to believe that multiemployer plans will "refrain[] from sending out withdrawal liability billings" until this Court decides a constitutional claim that has been uniformly rejected by all courts which have heard it.

3. The final Question Presented in the petition concerns the district court's award of attorney's fees to employers who are successful in their constitutional challenge. If the appellants prevail in Nos. 83-245 and 83-291, that issue will, of course, become moot because an employer will not then be a "prevailing party" within the meaning of 29 U.S.C. § 1451(e). Moreover, while the PBGC disagrees with the imposition of attorney's fees in this case, the attorney's fee issue is not sufficiently significant to deserve the attention of this Court, particularly in the absence of any conflict among the circuits.

such case is before me, and any such case should be decided on its own facts.

The court of appeals said (emphasis added):

We take special care to note that our holding applies only to those employers who withdrew before the enactment of the [Multiemployer] Act, but after the effective date of the Act. We express no opinion as to the constitutionality of the imposition of liability on employers who withdrew after September 26, 1980.

³ See authorities cited in the PBGC's Jurisdictional Statement, No. 83-245, pp. 14-15 and n.11 and in the PBGC's response (filed October 11, 1983) to petitioner's Motion to Defer, No. 83-507, p. 3 n.2.

For the foregoing reasons, the petition for a writ of certiorari should be held on this Court's docket to await decision in Nos. 83-245 and 83-291, and to be decided in conformity with this Court's ruling in Nos. 83-245 and 83-291.

Respectfully submitted,

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